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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

REPLY COMMENTS OF
CONSUMERS UNITED FOR RAIL EQUITY

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May 27, 2011

Consumers United for Rail Equity ("CURE") hereby files its Reply Comments. CURE is also a signatory on the Reply Comments being filed this day by the "Interested Parties."

<u>Summary</u>

1. The evidence submitted herein is overwhelming that the lack of rail-to- rail competition in the national rail system is harming the U.S. economy. (Section V of the "Interested Parties'" Initial Comments summarized the then-available evidence, and Section III of the "Interested Parties'" Reply Comments summarizes the substantial additional evidence now available from the Initial Comments filed herein.)
2. Circumstances have changed since the adoption of the switching and terminal access rules in the 1980s[1] and the 1996-97 "bottleneck rate" decisions[2] in two ways: (1) extensive consolidation of the major freight railroads such that there are today very few market participants and the remaining participants compete with each other on only a very limited basis, and (2) the remaining Class I railroads are financially healthy, indeed, robustly so. With respect to the "bottleneck" decision, there is a third change of circumstances. The Board's apparent view that the railroad that could provide competing transportation would provide a

[1] Ex Parte No. 445, *Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom. Baltimore Gas & Elec. Co. v. United States* (D.C. Cir. 1987); *MidTec Paper Corp. v. Chicago & North Western Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. MidTec Paper Corp. v. United States,* 857 F.2d 1487 (D.C. Cir. 1988).
[2] *Central Power and Light Co. v. Southern Pacific Transp. Co.* and embraced cases, 1 S.T.B. 1059 (1996), *petition for clarification granted,* 2 S.T.B. 235 (1997), *aff'd, MidAmerican Energy Co. v. ST B,* 169 F.3d 1099 (8th Cir. 1999) ("*MidAmerican*").

written contract upon which the rail customer could petition the Board for a "bottleneck" rate simply has failed to materialize in the 15 years since the decision was issued.

3. Circumstances have also clearly changed since the passage of the Staggers Act in that the far fewer Class I railroads remaining cannot and do not provide the rail-to-rail competition that Congress assumed would provide competitive rates and service for most shippers. In fact, the record contains specific examples from rail customers indicating that the major freight railroads often refuse to compete even where competition is physically possible.
4. Inter-modal competition (typically from trucks or barges) is not an adequate substitute for rail-to-rail competition for many rail-dependent customers.
5. The Board has the authority, and we believe, the responsibility, to revise its policies as the national rail system evolves to take into consideration changed circumstances that are preventing the realization of the type of national rail system envisioned by Congress in 1980: a system consisting of transparent, financially healthy railroads that compete with each other and other modes of competition for the nation's transportation business.
6. Accordingly, the Board should adopt pro-competitive remedies, such as requiring railroads to quote "bottleneck rates" to any interchange point with another railroad, and to provide reciprocal switching or access to terminal

areas without requiring a showing of "competitive abuse" as now required under the ICC's 1986 *MidTec*[3] decision

7. The Board should consider adopting a reasonable methodology for access pricing that is similar to the access pricing methodologies adopted by the Federal Communications Commission ("FCC") and the Federal Energy Regulatory Commission ("FERC").

I.

THE EVIDENCE IS OVERWHELMING THAT THE LACK OF RAIL-T0-RAIL COMPETITION IN THE NATIONAL RAIL SYSTEM IS HARMING THE U.S. ECONOMY.

In Section V of the Initial Comments of the Interested Parties filed herein on April 12, 2011, CURE and the other Interested Parties submitted substantial, hard evidence of the absence of rail-to-rail competition that is harmful to the U.S. economy. In Section III of the Reply Comments of the Interested Parties being filed today, CURE and the other Interested Parties are providing a summary of additional such evidence from shippers, shipper organizations, and governmental entities. In addition, we attach to this statement a March 11, 2011 letter from the Export Council to the President listing "STB reform" as one item that would assist the nation to achieve greater exports.

CURE notes that, at least as of May 26, 2011, no shipper, port, state agency, or economic development agency has offered specific evidence that a change in Board policies would harm it. Rather, the railroads and their allies

[3] *MidTec Paper Corp. v. Chicago & North Western Transp. Co.*, 3 I.C.C. 171 (1986), *aff'd sub nom. MidTec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

(many of whom are not shippers, but vendors who profit from selling goods or services to the railroads, or entities such as ports, who do business with the railroads) merely make unsupported allegations of supposed harm to the railroad industry if increased rail-to-rail competition were to occur in the national freight rail system. No filed comments specifically identify how changes would harm anyone, except inferentially to claim that rail-to-rail competition would reduce revenues to the railroads.

CURE acknowledges that some changes it urges could reduce railroad rates or charges. After all, competition is accepted in a capitalist economy as the best regulator of price and service. In the absence of competition, regulation is required where the goods or service at issue are essential in nature. But the fact that a company must contend with competition doesn't mean, necessarily, that the company will be less profitable. Competitive companies normally attract greater volumes of business and have the opportunity to reduce their costs, often resulting in higher profits than are achieved by regulated companies. Even if increased competition would result in reduced prices over a period of time, the financial performance of the major freight railroads has included major stock buy-back programs and increased dividends, suggesting that the freight railroads are generating more than minimal profits.[4] Moreover, if railroad rates, charges, and

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[4] AAR provided the Verified Statement of an investment analyst, William J. Rennicke, with Oliver Wyman, Inc., who assumed that, if the Board required railroads to quote "bottleneck rates," all such rates would be challenged, the shipper would prevail in each instance, and the Board would prescribe a maximum reasonable rate at an R/VC level of 180%. *Id.* at 20. The assumptions are so ridiculous as to render the investment advisor's estimate of the annual revenue loss -- $5.2 billion -- to be meaningless. In cases involving rate

service are reformed so that the U.S. economy benefits, and production that is now being forced overseas instead remains in the United States, everyone in the United States – the shippers, railroads, and railroad allies – will benefit.

II.

CIRCUMSTANCES HAVE CHANGED SINCE THE ADOPTION OF RECIPROCAL SWITCHING AND TERMINAL ACCESS RULES AND THE "BOTTLENECK RATE" DECISIONS.

The Interested Parties laid out substantial evidence of the changed circumstances in the U.S. railroad industry since the enactment of the Staggers Rail Act of 1980. After the enactment of the Staggers Act, the Board's predecessor, the Interstate Commerce Commission ("ICC"), in the 1980s adopted policies that imposed substantial obstacles to obtaining competitive access relief in the form of reciprocal switching or terminal access rights. As the Interested Parties explain, those policies were developed explicitly "with a thumb on the scales of justice" by the ICC to assist railroads in enhancing their revenues and profitability, because the railroads were considered "revenue-inadequate." That is also true of the "bottleneck rate" decisions, issued in 1996-97 shortly after the Union Pacific-Southern Pacific merger was approved. The Board relied on the alleged "revenue inadequacy" of the railroads in adopting that policy and the Eighth Circuit noted that fact in its decision as a basis for affirming the Board.[5]

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challenges where the STB has established a lower rate after litigation, the only rates that are as low as 180% R/VC are those where the rail carrier has stipulated that the maximum rate should be at 180% R/VC.

[5] *MidAmerican,* 169 F.3d at 1107.

Today, the remaining major freight railroads in our nation are robustly healthy financially as the quarterly analysis of railroad financial health by the Wall Street investment houses clearly indicates. The details are laid out by the Interested Parties in their Initial and Reply Comments.[6]

III.

THERE IS FAR LESS RAIL-TO-RAIL COMPETITION TODAY AS COMPARED TO 1980 OR EVEN THE 1990s, AS A RESULT OF MERGERS AND ACQUISITIONS APPROVED BY THE BOARD AND SUBSEQUENT APPARENT CLASS I RAILROAD DETERMINATIONS NOT TO COMPETE WITH EACH OTHER.

The very large mergers – UP-C&NW, BN-ATSF, UP-SP, and the Conrail acquisition by CSX and Norfolk Southern approved by the ICC and STB in the 1990s – greatly reduced rail-to-rail competition in large areas of the United States.[7] This point should be obvious, but given the Board's past assertions in those proceedings that a loss of competition would not occur as a result of the consolidations, and the assertion of these same claims by the railroads in their Initial Comments in this proceeding, the evidence filed by many shippers and parties supportive of the shippers in this proceeding demonstrates beyond dispute that loss of rail-to-rail competition has occurred as a result of Board approved railroad consolidations.

Accordingly, there are far-fewer Class I railroads in the United States today than there were in 1980. (The creation of new, short-line railroads may support

[7] April 12, 2011 Joint Comments of "Interested Parties" (Alliance for Rail Competition, *et al.,* including CURE) at 6-16; *see also* April 12, 2011 Initial Comments of the United States Department of Transportation and United States Department of Justice at 3-5.

the simplistic claim that there are more railroads than in the past, but the presence of a short-line railroad, most of which are tied to the previous major railroad through "paper barrier" agreements or "tie-in" agreements, generally does not alter the competitive landscape in a region or even to a particular shipper, because of "tying agreements" and the limited reach of the short-line railroads.) In most regions, there are no more than two large railroads, but typically shippers in the region have access to only one of the major railroads. Therefore, when the restrictions on competitive-access remedies (reciprocal switching, terminal access rights, and "bottleneck" rates) are considered, the lack of access to two railroads means that a large number of shippers neither have competitive access nor have any means of convincing the Board to provide competitive access.

Of course, a shipper that is unable to obtain rail-to-rail competition for its entire movement also normally cannot obtain a "bottleneck" rate, as a result of the Board's 1996-97 "bottleneck" rate decisions, to preserve rail-to-rail competition from the origin or destination to the point of interchange. This is despite the belief of the STB, when the "contract exception" to the "bottleneck rate" decisions was created, that railroads would compete by offering contracts for the "non-bottleneck" segment. As a number of shipper filings in this proceeding demonstrate, there have been very few, if any, such contract offerings. In other words, even where railroads physically can compete for each other's business, they rarely do so.

For some shippers who have benefited from rail-to-rail competition in the past, that competition has disappeared. Our members report that, starting in about 2003 or 2004, the major railroads seem to have shifted their focus from gaining additional market share to maximizing their revenue from existing traffic. Thus, the non-incumbent carrier often offers only an uncompetitive rate, no rate or otherwise evinces no interest in obtaining the transportation. Indeed, shippers who previously constructed "build-outs" to obtain access to a second competitor find themselves potentially worse off than if they had not built out, because the "build-out" could prevent the shipper showing it is subject to railroad market dominance under the Board's current policies. Thus, the rail customer has the worst of all worlds: no competition for its transportation business and no ability to challenge its rate at the Board. As a result, petitions for "build-outs" have dropped precipitously at the Board.

So, our national rail system today is, essentially, an oligopoly in the East and an oligopoly in the West, with large areas existing where only one major railroad provides service.

IV

EFFECTIVE INTER-MODAL COMPETITION DOES NOT EXIST FOR MANY SHIPPERS.

Railroads claim that inter-modal competition – typically, trucks or barges -- provides effective competition for many shippers. While CURE does not dispute that some shippers have effective inter-modal competition, it is also clear that most bulk shippers, such as grain, chemical, forest-products, ore, and coal shippers, do not have access to inter-modal competition in most markets. (Barge competition is available in some markets, but that form of competition is only available in certain portions of the country, and even there, is dependent on the normal operation of the waterways. For example, some Mississippi River traffic is blocked or reduced at the present time due to flooding; at other times, lack of adequate rainfall or maintenance of locks and dams has reduced or prevented effective barge competition.)

However, it is not necessary for the Board to determine how much or how little effective inter-modal competition exists. The filings in this proceeding demonstrate that there are a very large number of rail customers who do not have effective transportation competition from other modes. Those that have such competition do not seek relief from the Board because market competition provides efficient rates and optimum service. The Board's policies, therefore, only affect those shippers who may invoke the Board's processes, and who are, by definition, the parties who need the protection those processes may provide.

V.

THE BOARD HAS THE AUTHORITY AND, WE BELIEVE, THE DUTY TO REVISE ITS POLICIES AS CIRCUMSTANCES CHANGE AND CONDITIONS WARRANT.

The Interested Parties provided in their Initial Comments, and are providing in their Reply Comments, substantial authority for the proposition that the Board, like any other regulatory authority, has discretion under its governing statute to revise its existing policies. CURE adopts and incorporates those arguments and that authority by reference.[8]

Of particular note is Congressional testimony presented by the Board to Congress. On October 23, 2003 – well after the passage of ICCTA, but near the beginning of the post-ICCTA efforts by CURE and others to enact pro-competition legislation -- the Board was called before the Senate Commerce, Science and Transportation Committee of the United States Senate to testify regarding "Railroad Shipper Issues and S. 919, the Railroad Competition Act of 2003".The witness for the Board was its then-Chairman, Roger P. Nober.[9] During the hearing, the following exchange between Senator Conrad Burns of Montana and Chairman Nober occurred:

> Senator BURNS. While we have got you on the hot seat, we might as well leave you right there. Mr. Nober, there is a quote here that is sort of made by you that has some of us sort of-gave us some anxious moments. I quote from you: "Look, I am not going to insult your intelligence and tell

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[8] We wish to emphasize that the *Great Northern Ry. Co. v. Sullivan* decision of the Supreme Court, 294 U.S. 458 (1935), is not a bar to changing the "bottleneck rate" decision. The Interested Parties have explained this well, but two points deserve special emphasis. One, the Board itself believed that the "bottleneck rate" policy it adopted would permit rail-to-rail competition because of the "contract exception," obviously assuming that railroads would offer such contracts. *See* January 11, 2011 Notice at 4 n.6. Yet, the evidence is that at least the Class I railroads do not do so, so the notion of obtaining contracts first and then obtain a "bottleneck rate" is illusory. We presume that the 1996-97 Board intended to provide a meaningful exception to its "bottleneck rate" policy, but as subsequent events have shown, it did not. Two, the *Great Northern* decision was issued in 1935, when all rail rates were regulated, whereas today, of course, they are not. Instead, competition, not regulation, "to the maximum extent possible," has been the applicable policy of Congress since 1980. To promote that policy, the Board must require railroads to quote "bottleneck rates" so that shippers can then at least seek rail-to-rail competition from or to the point of interchange.

[9] BNSF, UP, CP and KCS do not argue in their Initial Comments the strained and unsupported "ratification" argument put forth by the AAR, NS and CSXT.

> you I could not change, that our [B]oard could not interpret some of the core rulings that you want us to make a change." You were talking to some shippers. "We could, but we are not going to."
>
> Could that be the core of our problem here? Would you like to revise and extend?
>
> Mr. NOBER. Certainly, Senator. In my testimony I did, I acknowledged that that is true, that *the doctrines that many of the shippers would like to see changed, which are our bottleneck doctrine and our Midtek [sic: MidTec] or terminal trackage rights doctrine, are administrative doctrines and as a matter of law an administrative agency can change administrative doctrines.* Not everyone on our [B]oard has always acknowledged that but *I as a student of Congress will tell you that we certainly can.* Now, whether or not we should and we would are different questions.[10]

Indeed, the Board has changed some of those policies in (1) its "bottleneck rate" decisions in 1996-97, (2) its decision in the late 1990s to revise its "market dominance" policies to largely exclude product and geographic competition from consideration, (3) its revised Class I railroad consolidation policies in 2001, (4) its modifications to its guidelines and procedures for "small-shipment" rail rate challenges starting with the first such challenge (*BP Amoco Chemical Co. v. NS,* STB Docket No. 42093) in 2005, and (5) its standards for large rail rate challenges in 2007. In light of these past actions,[11] it is clear that

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[10] Hearing Before the Committee on Commerce, Science, and Transportation, United States Senate, One Hundred Eighth Congress First Session, October 23, 2003 at 20 (emphasis added). Interestingly, the NS Comments themselves note that ICC Chairman Gail McDonald, in pre-ICCTA testimony, also noted that the ICC had authority to order competitive access. NS Comments at 18 n.10. Thus, in making no change to the text of the relevant statutory provisions governing competitive access in ICCTA, Congress simply maintained the discretion which the agency had all along.

[11] *E.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-43 (1984) and its progeny.

the Board has the ability to change its interpretation of the Staggers Rail Act, so long as it has a rational basis for its change in interpretation.

VI.

ACCORDINGLY, THE BOARD SHOULD ADOPT PRO-COMPETITIVE POLICIES TO PROMOTE COMPETITION, NOT REGULATION, "TO THE MAXIMUM EXTENT POSSIBLE," AS THE CONGRESS PROVIDED.

Congress stated as plainly as the English language permits that competition, "to the maximum extent possible," and not regulation, should be the governing policy to implement the Staggers Act. Given the lack of competition that governmental entities such as the Departments of Agriculture, Justice, and Transportation, shippers, and shipper organizations provided to the Board in this proceeding, we believe the "maximum...possible" rail-to-rail competition will not occur in the national rail system unless the Board modifies its regulations to enable such competition.

Of course, it is not possible to "put Humpty Dumpty" back together again; CURE does not advocate an attempt to re-create the Class I railroads that existed before the mergers and acquisitions approved by the Board and the ICC. Rather, to the extent possible, CURE advocates that the Board revise its policies to allow the rail-to-rail competition that is still physically possible in the national freight rail system, but is being prevented by railroad intransigence and past regulatory rulings of the Board and its predecessor. Board actions that would increase rail-to-rail competition are to (1) overturn the *MidTec* decision so that "competitive abuse" need not be shown before reciprocal switching relief is available; (2) revise its policies similarly to permit terminal access rights; and (3) overturn its "bottleneck" rate decision to require railroads to quote "bottleneck" rates to a point of access to a second major rail system,, rather than to first require shippers to obtain a contract from the non-"bottleneck" railroad before a railroad can be required by the Board to quote a "bottleneck rate" .

Finally, the Board should establish a standard for access pricing for use with respect to reciprocal switching, terminal access rights, or "bottleneck" rates. Access pricing must be pro-competitive and must not require full-scale rate case litigation before the Board. Indeed, in a number of mergers and acquisitions since 1980, most recently in the *Conrail* acquisition proceeding, the Board has approved or imposed actual-cost-based access pricing that does not require any Board involvement to implement. The FCC and the FERC have also implemented successful, reasonable, cost-based, non-discriminatory access pricing that has produced greater competition resulting in benefits for customers, network service providers, and the U.S. economy. CURE believes that the same results would occur in the U.S. railroad industry if the Board were to change its policies to promote effective rail-to-rail competition, including actual-cost-based access pricing.

Conclusion

For the foregoing reasons, the Board should move forward into rulemaking proceedings to adopt the relief sought by CURE in its Initial Comments filed herein on April 12, 2011.

Respectfully submitted,

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May 27, 2011

THE PRESIDENT'S EXPORT COUNCIL
WASHINGTON, D.C. 20230

March 11, 2011

President of the United States of America
The White House
Washington, DC 20500

Dear Mr. President,

As members of the President's Export Council, we appreciate the opportunity to help you and your Administration craft a national strategy to enhance our nation's ability to send American- made goods and services into markets around the world.

A robust, reliable, and efficient domestic transportation infrastructure is the critical 'first-step' on the road to more exports, and your Administration has made a tremendous investment in repairing and replacing our nation's aging infrastructure. As you explained in the 2011 State of the Union address, "*Over the last two years, we have begun rebuilding for the 21st century, a project that has meant thousands of good jobs for the hard-hit construction industry.*" We support these efforts, not only because of the positive economic impact they have had, but also because of the role they play in facilitating exports.

America's transportation infrastructure is also America's export infrastructure.

America's highways, railways, bridges, waterways, ports, runways and air traffic control systems are at the very beginning of a very long global logistics chain. American business cannot participate in the global economy if it cannot get its products out the door.

This is an effort that includes all modes of transportation:

- Freight rail moves goods in and out of 49 of the 50 states.
- 70% of all U.S. freight moves at some point by truck.
- 60% of all U.S. grain exports are shipped through the mouth of the Mississippi River.
- In 2009, U.S exports transported by U.S. passenger and cargo airlines equaled $334 billion or nearly 20% of all U.S. exports of goods and services.
- U.S. ports support, directly and indirectly, more than 13 million American jobs.

There are several steps we suggest your Administration consider enhancing America's export infrastructure:

1. Comprehensive Review and Collaboration. The Department of Transportation (DOT) should embark on a top-down review of the nation's export infrastructure value chain in order to determine where the weaknesses and choke-points are located. Armed with this information,

collaboration between local, state and federal agencies and the private sector should be encouraged to create opportunities that will speed products to overseas markets. The Regional Goods Movement Plan being created by the Port Authority of New York and New Jersey and the Southern California Multi-County Goods Movement Action Plan are examples of significant regional effort that align with the PEC's goals.

2. Develop Export Corridors. Using the results of the DOT 's study, your Administration should identify export infrastructure 'corridors' and build federal inter-agency and inter-governmental teams to provide strategic guidance for the development, management and enhancement of export infrastructure programs. Various incentives to encourage private sector infrastructure investment within the corridors could also be explored. Protecting and modernizing the vital Detroit/Windsor border crossing, projects to prepare South Atlantic seaports for the calling of Post-Panamax vessels, and rail-focused improvements to the San Pedro Bay Ports complex are examples of areas where a newfound commitment to export infrastructure is needed.

3. Export Driven Prioritization of Infrastructure Projects. There is a long list of transportation infrastructure projects awaiting action. We believe that the federal government should take into account their positive impact on exports when evaluating, prioritizing, and scheduling transportation infrastructure projects. As you explained in your 2011 State of the Union address, we should pick infrastructure projects "*...based on what's best for the economy, not politicians.*" Assigning a metric to each project that compares a project's contribution to increasing exports relative to its overall cost might be one way to highlight those efforts where the contribution is exceptionally strong. Investments to upgrade ports, such as the one at Long Beach, California, and those serving the Pacific Northwest, would likely find themselves well-placed on such a list. The Lower Mississippi River is in need of reliable funding for dredging in order to maintain a safe depth for navigation and prevent disruptions to ship traffic and the commerce it supports. Modernizing our nation's outdated air traffic control system, including the acceleration of NextGen, is another critical infrastructure priority that will help drive export growth.

4. Comprehensive Funding Strategy. Modernizing our nation's export infrastructure system will require not only greater investment, but also more efficient use of resources in light of your Administration's focus on reducing the federal budget deficit. Nevertheless, your Administration should ensure that transportation trust funds are used for infrastructure development, not deficit reduction. The highway, inland waterways and aviation trust funds, protected by budgetary firewalls, should be the backbone of these transportation infrastructure investments. We further encourage consideration of the establishment of a National Infrastructure Bank, which will leverage private and other non-federal government resources to make wise investments in infrastructure projects that will help drive exports.

5. Address longer-term structural needs of exporters. Efforts such as Surface Transportation Board reform (involving rail competition), using truck-only lanes in congested urban areas, reducing driver wait times, and alleviating the significant shortage of long-haul drivers will promote efficient and cost-effective interstate commerce and further enable the export corridors to flourish. Improving our infrastructure to reduce congestion and wait times will bring efficiencies

to our nation's supply chain that will translate to savings and help reduce the burden on small- and medium-sized businesses engaged in commerce.

These policy suggestions can be readily applied to existing infrastructure funding programs. Developing the metrics to better understand a project's impact on exports will help our nation decide where to invest our limited infrastructure dollars.

As you know, infrastructure investments benefit more than just the export community; the positive domestic economic impact of this investment is tremendous:

- U.S. ports are directly responsible for 8.4 million jobs.
- U.S. freight rail paid $18 billion in wages alone.
- One of every thirteen private sector employees in the U.S. works in trucking.
- Transportation construction generates over $245 billion in annual economic activity and supports more than three million U.S. jobs.
- The U.S. air transportation system supports a civil aviation industry that accounts for $1.2 trillion in economic activity, or 5.2 percent of U.S. Gross Domestic Product (GDP), while the U.S. aerospace industry has the largest export surplus of any manufacturing sector.
- Accelerating NextGen and incentivizing the necessary avionics equipage would generate over $30 billion in economic activity.
- And America's rural communities draw particular economic strength from their ability to generate trade surpluses year after year.

The dynamic global economy is open to America's manufacturers, small businesses, farmers, and other innovators. Through continued investment in America's export infrastructure, your Administration can help ensure America's competitive advantage through our ability to offer products on affordable, reliable, and consistent terms.

Thank you again for the opportunity to share these important ideas with you and your Administration.[1]

Sincerely,

[1] Please note that this letter has been prepared by the private-sector appointed members of the PEC.